

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

HAMZA MEAT CORP. d/b/a FINE FARE SUPERMARKETS, INC.

and

Case No. 29-CA-30770
29-CA-30783

LOCAL 338, RETAIL, WHOLESALE AND DEPARTMENT STORE
UNION, UNITED FOOD AND COMMERCIAL WORKERS

Brent Childerhose, Esq., New York, NY, Counsel for the
Acting General Counsel

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. I heard this case in Brooklyn, NY on September 1, 2011, at which time counsel for the Acting General Counsel¹ moved for default judgment based upon the named Respondent's failure to file an answer. As discussed further below, the charges and amended charges in this proceeding were filed on May 4, May 9 and June 22, 2011² by Ivan Saenz and Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers (the Union) alleging violations of Section 8(a)(1) and (3) of the Act. The record shows that these charges were mailed by regular mail to Hamza Meat Corp., d/b/a Fine Fair Supermarkets (Respondent).

A Complaint and Notice of Hearing dated July 29 was issued by the Regional Director of Region 29 of the National Labor Relations Board. The United States Postal Service return receipt shows that the complaint was served upon Respondent, by registered mail on July 30. A copy was sent by regular mail to the Respondent's counsel of record. The complaint states that an answer must be received by the Regional Office on or before August 12, or postmarked on or before August 11. The complaint further states that if an answer is not filed, or is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations of the complaint are true.

By email transmission dated August 18, counsel for the General Counsel notified Respondent's counsel of record that a complaint had been filed against Respondent, that a copy of the complaint had been duly served and that no answer to the complaint had been received. The email further stated that unless an answer to the complaint was received by the close of business on August 24, the Region would seek a default judgment from the Board on the allegations of the complaint. Respondent was further reminded that a hearing in this matter was scheduled for September 1. A response from Respondent's counsel dated August 24 establishes that this e mail was received.³

¹ Hereafter referred to as the General Counsel.

² Unless otherwise specified, all dates are in 2011.

³ Respondent's counsel did not address the issue of its failure to file an answer but stated that he had not heard from the General Counsel with regard to his client's offer to settle. The record before me does not establish whether the General Counsel responded to this email.

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. As noted above, the complaint affirmatively stated that unless an answer was received by August 12, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further it is undisputed that the General Counsel, by email dated August 18, notified the Respondent that unless an answer was received by August 24, a motion for default judgment would be filed. Nevertheless, Respondent failed to file an answer.

No answer having been filed in this proceeding and the Respondent not having made an appearance in person or by counsel or otherwise showing good cause for its failure to file an answer, pursuant to the General Counsel's motion for default judgment I hereby make the following

Findings of Fact

I. Filing and Service of the Charges

The charge in Case No. 29-CA-30770 was filed by Ivan Saenz on May 4 and a copy was served by regular mail on Respondent on May 6. The charge in Case No. 29-CA-30783 was filed by the Union on May 9, and a copy was served by regular mail on Respondent on May 10. The first amended charge in Case No. 29-CA-30783 was filed by the Union on June 22, and a copy was served by regular mail on Respondent on June 24.

II. Jurisdiction

The Respondent is a domestic corporation with a principal office located at 405 Remsen Avenue, Brooklyn, New York (herein called the Remsen Avenue facility) and other facilities located in Pennsylvania, New Jersey and New York and is engaged in the retail sale of food products. During the past calendar year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations described above, derived gross annual revenues in excess of \$500,000 and purchased and received goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New York.

Based upon the foregoing, I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I further find that, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

At all material times, the following individuals have occupied the positions set forth next to their names and have been supervisors within the meaning of Section 2(11) of the Act and agents of Respondent acting on its behalf:

Mustafa Abu Saab
Mark LNU

Owner
Supervisor

Around late February, Respondent by Abu Saab, at the Remsen Avenue facility, interrogated employees about their union sympathies.

Around late February, Respondent reduced the pay of its employee Manuel de Jesus Hernandez Garcia. Around late March, Respondent increased the pay of de Jesus Hernandez Garcia. Around late April, Respondent reduced the pay of de Jesus Hernandez Garcia.

Respondent engaged the foregoing conduct because de Jesus Hernandez Garcia joined or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

On or about April 27, Respondent, by its supervisor Mark LNU, at the Remsen Avenue facility, prohibited employees from talking to each other.

On or about May 2, Respondent discharged its employee Ivan Saenz. Since on or about May 2, Respondent has failed and refused to reinstate or offer to reinstate Saenz to his former position of employment. Respondent engaged in the foregoing conduct because Saenz joined or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Alternatively, Respondent engaged in the conduct described above because Saenz engaged in conduct in violation of the above-described rule prohibiting employees from talking to each other.

Conclusions of Law

By the acts described above Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act⁴ and has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.⁵ Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having discriminatorily reduced the pay of Manuel de Jesus Hernandez, I recommend that Respondent make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Having discriminatorily discharged Ivan Saenz, I recommend that Respondent offer him reinstatement to his former position or, if that position no longer exists, to

⁴ As outlined in the complaint, the violations of Section 8(a)(1) found herein include the interrogation of employees by Abu Saab, the prohibition on employees speaking with each other, and the discharge of Ivan Saenz and refusal to reinstate him to his former position of employment for violating the employer's prohibition on employees' talking to each other.

⁵ The acts alleged and found to have violated these provisions of the Act are: the reduction, increase and reduction in pay for Manuel de Jesus Hernandez Garcia and the discharge of and refusal to reinstate Saenz to his former position of employment because Saenz joined or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

a substantially equivalent one and make him whole for any loss of earnings and other benefits, in the manner set forth above. Respondent shall also, within 14 days of the Board's order remove from its files any reference to the unlawful discharge, notify Saenz in writing that this has been done and that his discharge will not be used against him in any way. I further
 5 recommend that Respondent be ordered to rescind its rule prohibiting employees from talking with each other. Respondent shall also be ordered to post and, if appropriate, electronically distribute a notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the
 10 following recommended⁶

ORDER

The Respondent, Hamza Meat Corp. d/b/a Fine Fare Supermarkets, Inc., its officers,
 15 agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies.

(b) Prohibiting employees from talking with one another or discharging them because
 20 they violate such a rule.

(c) Increasing or reducing the wages of its employees because they join or assist Local
 25 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers (the Union) or engage in concerted activities and to discourage employees from engaging in such activities

(d) Discharging or otherwise discriminating against any employee for supporting the
 30 Union or engaging in concerted activities and to discourage employees from engaging in such activities

(e) In any like or related manner interfering with, restraining, or coercing employees in
 35 the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule prohibiting employees from talking with one another.

(b) Make Manuel de Jesus Hernandez Garcia whole for any loss of earnings and other
 40 benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, offer Ivan Saenz full
 45 reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and
 50 Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Make Ivan Saenz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the Saenz in writing that this has been done and that the discharge will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Remsen Avenue facility in Brooklyn, New York copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by e-mail, posting on an intranet and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2011.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 22, 2011.

Mindy E. Landow
Administrative Law Judge

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interrogate you about your union sympathies.

WE WILL NOT prohibit you from talking with one another.

WE WILL NOT increase or reduce your wages because you join or assist Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers (the Union) or engage in concerted activities.

WE WILL NOT discharge or otherwise discriminate against you because you support the Union or engage in concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL rescind our rule prohibiting you from talking with one another

WE WILL make Manuel de Jesus Hernandez Garcia whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, plus interest.

WE WILL offer Ivan Saenz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ivan Saenz whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, less interim earnings, plus interest.

WE WILL remove from our files any reference to Saenz's unlawful discharge, and notify him in writing that this has been done and that the discharge will not be used against him in any way.

HAMZA MEAT CORP. d/b/a FINE FARE
SUPERMARKETS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100

Brooklyn, New York 11201-3838

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.